Supreme Court, U.S.
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No. 001478

IN THE
SUPREME COURT OF THE UNITED STATES

KENNETH WAYNE HARTER
and JOHN ROBERT PAYNE,
Petitioners,

v.

C. D. VERNON, individually
and in his official capacity as Sheriff of
Rockingham County, and U.S. FIDELITY
AND GUARANTY COMPANY,
Respondents.

Petition For Writ Of Certiorari
To The North Carolina Supreme Court

PETITION FOR WRIT OF CERTIORARI

Martha A. Geer
Counsel of Record
Melinda Lawrence
PATTERSON, HARKAVY
& LAWRENCE, L.L.P.
200 West Morgan Street
Post Office Box 27927
Raleigh, North Carolina 27611
Telephone: (919) 755-1812

Counsel For Petitioners

31pp

QUESTION PRESENTED

Under 28 U.S.C. § 1367, is the statute of limitations for a state law claim suspended, or tolled, while that claim is pending in federal court so that, upon dismissal of that claim from federal court, a plaintiff has the time remaining on the statute of limitations, at the time of the initial filing in federal court, or 30 days in which to re-file in state court, whichever is greater?

PARTIES TO THE PROCEEDING

The plaintiffs in the trial court were Kenneth Wayne Harter and John Robert Payne, a former dispatcher and a former deputy sheriff of the Rockingham County Sheriff's Department. The defendants were C.D. Vernon, the former Sheriff of Rockingham County, sued in his individual and official capacities, and U.S. Fidelity and Guaranty Company, the surety on Sheriff Vernon's bond.

In the North Carolina Court of Appeals and the North Carolina Supreme Court, plaintiffs were the appellants and defendants were the appellees. Plaintiffs are the petitioners in this proceeding.

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The petitioners, Kenneth Wayne Harter and John Robert Payne, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the North Carolina Court of Appeals entered in this proceeding on July 18, 2000.

OPINIONS BELOW

The opinion of the North Carolina Court of Appeals is reported at 139 N.C. App. 85, 532 S.E.2d 836, disc. rev. denied, 453 N.C. 263, ___ S.E.2d ___ (Dec. 20, 2000). It is reprinted in the appendix to this petition beginning at p. 1a. The order of the North Carolina Supreme Court dismissing plaintiffs' appeal and denying plaintiffs' petition for discretionary review is reprinted beginning at p. 16a.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on July 18, 2000 (App. A at 1a). A motion to dismiss the appeal was allowed for lack of a substantial constitutional question and a petition for discretionary review was denied by the North Carolina Supreme Court on December 20, 2000 (App. B at 16a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall

> be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTE INVOLVED

28 U.S.C. § 1367(d) provides:

> The period of limitations for any claim asserted under subsection (a) and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

STATEMENT OF THE CASE

On July 15, 1994, C.D. Vernon, the Rockingham County Sheriff, fired plaintiff Harter, a dispatcher, and plaintiff Payne, a deputy sheriff, along with five other employees of the Sheriff's Department. On January 31, 1995, plaintiffs filed suit in the United States District Court for the Middle District of North Carolina, alleging that they were fired because the Sheriff believed that they supported his opponent in the 1994 primary and because they had failed actively to support the Sheriff in his reelection campaign. Plaintiffs contended that their dismissals violated the First Amendment of the United States Constitution and Sections 12 and 14 of Article I of the North Carolina Constitution and constituted wrongful discharges in violation of North Carolina public policy.

After the district court denied summary judgment, defendant Vernon filed an interlocutory appeal, contending that he was entitled to Eleventh Amendment immunity. The Fourth Circuit affirmed the district court's decision and, simultaneously with the filing of the opinion, sua sponte denied rehearing en banc. Harter v. Vernon, 101 F.3d 334 (4th Cir. 1996). Despite this sua sponte denial, defendant subsequently filed a petition for rehearing en banc that was also denied. After this Court denied defendant's petition for writ of certiorari, 521 U.S. 1120 (1997), defendant then asked the Fourth Circuit to revisit the issue yet again and withdraw its mandate, a motion that was denied.

On November 5, 1997, the district court concluded that the intervening Fourth Circuit decision in Jenkins v. Medford, 119 F.3d 1156 (4th Cir. 1996), cert. denied, 117 S. Ct. 2511 (1997), required dismissal of plaintiffs' § 1983 claims. Harter v. Vernon, 980 F. Supp. 162, 165 (M.D.N.C. 1997). The court declined to retain jurisdiction of plaintiffs' state constitutional and wrongful discharge claims and dismissed them without prejudice. Id.

Although plaintiffs initially appealed the district court's decision, the parties stipulated to a dismissal of that appeal on February 23, 1998. Plaintiffs refiled their state constitutional and wrongful discharge claims in Rockingham County Superior Court on July 20, 1998.

On April 6, 1999, the Rockingham County Superior Court granted defendants' motion for summary judgment "for the reasons stated in defendants' brief." Defendants had not made any argument in their motion, in oral argument, or in their brief that plaintiffs' claims were barred by the statute of limitations. Plaintiffs timely appealed the summary judgment decision.

In their responsive brief before the North Carolina Court of Appeals, defendants argued for the first time that summary

judgment was justified based on Huang v. Ziko, 132 N.C. App. 358, 511 S.E.2d 305 (1999), a decision construing 28 U.S.C. § 1367(d) that was decided seven months after plaintiffs had filed suit. The court of appeals declined to rule on the merits of plaintiffs' claims and instead upheld the grant of summary judgment based on Huang and 28 U.S.C. § 1367(d).

The court ruled that Huang established a flat 30-day limitation for the re-filing of state law claims in state court. The court rejected plaintiffs' contention that because the statute of limitations was tolled under § 1367(d), they had, subject to a defense of laches, 2½ years, the time remaining on the statute of limitations when the federal action was filed, in which to file in state court. Since plaintiffs' state court action was filed more than 30 days after the dismissal from federal court, the court concluded that plaintiffs' claims were barred by the statute of limitations.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW, CONSTRUING 28 U.S.C. § 1367(d) TO REQUIRE THAT ALL STATE LAW CLAIMS BE RE-FILED WITHIN 30 DAYS, CONFLICTS WITH THIS COURT'S PRIOR DECISION REGARDING TOLLING.

Although the court of appeals relied on 28 U.S.C. § 1367(d) to justify limiting a plaintiff to only 30 days in which to re-file state law claims, the wording of that statute does not support a 30-day limitation. The statute provides that the period of limitations "shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period." (Emphasis added) In deciding whether this language means that a plaintiff, in the absence of more favorable state law, has only 30 days to re-file, the critical question centers on the proper interpretation of the word "tolled."

Under the court of appeals' analysis, upon the filing of a federal action, the statute of limitations clock does not stop ticking, but rather continues to run. This analysis is inconsistent with the traditional notion of tolling.

Customarily, the word "tolled" has meant a suspension of the statute of limitations. A leading treatise on torts, in describing the conventional meaning of "tolling" explains: "Tolling can be thought of as a stay or suspension of the statute, a kind of time-out in which the statutory clock is stopped." D. Dobbs, The Law of Torts § 221 at 564. Professor Dobbs distinguishes tolling from a "grace period": with a grace period, "the clock is not stopped", but rather the law permits an extension of time to file following the expiration of the statute of limitations. Id. In other words, the approach adopted by the court of appeals below interprets § 1367(d) to provide a "grace period", despite its express use of the word "tolled."

No reason exists for presuming that Congress intended, when providing that the statute of limitations was tolled while the federal action was pending, to use the word "tolled" in any manner other than conventionally. Indeed, Congress is presumed to have acted not on a blank slate, but with consciousness of prior analogous court rulings. Cannon v. University of Chicago, 441 U.S. 677, 696-97, 99 S. Ct. 1946, 1957-58, 60 L.Ed.2d 560 (1979) (courts may presume that Congress was aware of prior court decisions and intended subsequent enactments to be interpreted consistent with those decisions).

In Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 353-54, 103 S. Ct. 2392, 2397-98, 76 L.Ed.2d 628 (1983), this Court held that a pending class action "tolled the statute of limitations" with respect to the claims of individual class members. The Court explained more specifically that the statute of limitations was "suspend[ed]" upon the filing of the class action and continued to be tolled until class certification

was denied. Id. At that point, the individual class members could file their individual claims within the time remaining on the statute of limitations at the time the class action was initially filed. Id. at 346-47 & 354, 103 S. Ct. at 2394 & 2398.

In light of the well-established principles set forth in Crown, Cork, it is unlikely that, when using the word "tolled," Congress intended silently to reject true tolling in favor of a single 30-day grace period. Instead, consistent with traditional tolling principles, Congress most likely intended – by tolling the statute of limitations during the pendency of the federal action "and for" 30 days after dismissal – to provide both for a tolling period and for a grace period. Under the tolling period, a plaintiff would be entitled, subject to a defense of laches, to the remainder of the statute of limitations to re-file, but if the plaintiff had filed in federal court on the eve of the statute of limitations, the grace period would grant an additional 30 days.

Such a tolling or suspension analysis is hardly novel. 51 Am. Jur.2d § 170 at 740 (emphasis added) reports:

> It is frequently held, and sometimes expressly provided by statute, that during the period of the restraint incident to other legal proceedings which are of such a character that the law forbids one of the parties to exercise a legal remedy against another, the running of the statute of limitations is postponed, or if it has commenced to run, is suspended. The broad general principle that the time during which a person is prevented from exercising his legal remedy by some paramount authority is not to be counted against him in determining whether his right is barred by the limitations statute is applicable.

Significantly, in North Carolina, as in most jurisdictions, plaintiffs are forbidden from filing their state law claims in state court while their federal action is still pending. Eways v. Governor's Island v. J.L. Todd Auction Co., 326 N.C. 552, 560-61, 391 S.E.2d 182, 187 (1990) (where a prior action is pending in federal court regarding the same facts, the second action is abated; the state court lacks subject matter jurisdiction). Thus, the principle described in 51 Am. Jur.2d § 170 leads to the conclusion that the time that elapses while a plaintiff is in federal court is not counted toward the statute of limitations.

The decision in this case thus gives controlling authority only to one part of § 1367(d): the grace period. It rejects the portion of § 1367(d) that tolled the statute of limitations during the prosecution of the federal action.

II. BECAUSE OF THE INCREASING FREQUENCY WITH WHICH STATE LAW CLAIMS ARE BEING DISMISSED FROM FEDERAL COURT, STATE COURTS NEED GUIDANCE IN APPLYING 28 U.S.C. § 1367(d).

The Fourth Circuit, like other Circuits, has held that when federal claims are resolved against the plaintiff, supplemental state law claims should ordinarily be dismissed. Jenkins v. Medford, 119 F.3d 1156, 1165 (4th Cir. 1997) (en banc), cert. denied, 522 U.S. 1090, 118 S. Ct. 881, 139 L.Ed.2d 869 (1998) ("We direct the district court to dismiss the [plaintiffs'] claim. In the absence of a federal action, the [plaintiffs'] claim under state law should also be dismissed."). North Carolina federal district courts have followed this mandate even in cases in which the claims have been litigated for a period of years, discovery completed, interlocutory appeals pursued, and trial scheduled, as this case demonstrates. See Harter v. Vernon, 980 F. Supp. 162, 164 (M.D.N.C. 1997) ("In the absence of a federal action, these state law claims should also be dismissed.").

As a result of this development, North Carolina state courts will likely have to address more frequently the question whether state claims have been timely re-filed. Indeed, even apart from this case, the issue has recently been addressed repeatedly in the North Carolina Court of Appeals. See, e.g., Harter v. Vernon, 139 N.C. App. 85, 532 S.E.2d 836 (2000), disc. rev. denied, 453 N.C. 263, __ S.E.2d __ (Dec. 20, 2000); Huang v. Ziko, 132 N.C. App. 358, 511 S.E.2d 305 (1999); Ward v. Lyall, 125 N.C. App. 732, 482 S.E.2d 740 (1997).

In order to limit the need to litigate this issue, this Court should use this case as an opportunity to address fully the proper application of § 1367 to re-filed state law claims. Because only state courts will ever have need to apply § 1367(d), this Court presents the only means for obtaining a federal court construction of this federal legislation.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted.

Dated: March 20, 2001

Respectfully submitted,

Martha A. Geer
COUNSEL OF RECORD
Melinda Lawrence
PATTERSON, HARKAVY &
LAWRENCE, L.L.P.
Post Office Box 27927
200 West Morgan Street
Raleigh, North Carolina 27611
Telephone: (919) 755-1812

APPENDIX A -- OPINION AND ORDER OF THE NORTH CAROLINA COURT OF APPEALS DECIDED JULY 18, 2000

KENNETH WAYNE HARTER and JOHN ROBERT PAYNE,
Plaintiffs,

v.

C.D. VERNON, Individually and in his official capacity as Sheriff of Rockingham County, and U.S. FIDELITY AND GUARANTY COMPANY,
Defendants.

Rockingham County

NO. COA99-992

North Carolina Court of Appeals.

Argued June 6, 2000.

Decided July 18, 2000.

* * * *

Before **HUNTER, GREENE** and **HORTON**, _____ Judges.

Affirmed by published opinion. Judge Hunter wrote the opinion. Judges Greene and Horton concurred.

OPINION

Appeal by plaintiffs from orders entered 30 March 1999 by Judge Jerry Cash Martin in Rockingham County Superior Court. Heard in the Court of Appeals 6 June 2000.

Patterson, Harkavy & Lawrence, L.L.P., by Martha A. Geer, for plaintiff-appellants.

Womble Carlyle Sandridge & Rice, P.L.L.C., by James R. Morgan, Jr., for defendant-appellees.

Moore & Van Allen, PLLC, by Jonathan D. Sasser; J. Michael McGuinness and Deborah K. Ross, for the North Carolina Police Benevolent Association, The Southern States Police Benevolent Association and The American Civil Liberties Union of North Carolina Legal Foundation, amici curiae.

Hafer, McNamara, Caldwell, Cutler & Curtner, P.A., by Edmond W. Caldwell, Jr. and David P. Ferrell, for the North Carolina Sheriffs' Association, amicus curiae.

HUNTER, Judge.

Plaintiff-appellants Kenneth Wayne Harter and John Robert Payne (collectively "plaintiffs") appeal the trial court's grant of defendant-appellees' C. D. Vernon and U.S. Fidelity and Guaranty Company (collectively "defendants") motion for summary judgment under N.C.R. Civ. P. 56. Although the trial court delineated its grant of that motion only by stating that "the motion should be granted for the reasons stated in defendants' brief," we agree with defendants that plaintiffs failed to timely file their action in state court, and thus the statute of limitations has run on plaintiffs' claims. Therefore, we hold that summary judgment for defendants was proper.

Due to our disposition of this case, we need relate very little of the factual history. Plaintiffs Harter and Payne worked as a dispatcher and a patrol deputy (respectively) for the Rockingham County Sheriff's Department under defendant Sheriff C. D. Vernon ("Sheriff Vernon"). In 1994

Sheriff Vernon was up for re-election in the democratic primary campaign and was (himself and through other employees) actively soliciting and recruiting support throughout the sheriff's department. Several members of the sheriff's department, including plaintiffs, did not actively participate in any campaign nor outwardly exhibit which candidate they were supporting. Nonetheless, Sheriff Vernon won the election and immediately thereafter, began an investigation of employees who "had not been loyal to him." On 15 July 1994, two months after the primary election, Sheriff Vernon fired seven of his employees including plaintiffs. Other officers within the department made statements that Sheriff "Vernon was firing the people on 'the list.'" Although both plaintiffs had recent performance appraisals, neither appraisals gave notice that either plaintiff was performing unsatisfactorily or was in danger of losing his job.

As to the procedural history, we take it directly from plaintiffs' brief to this Court. Originally, plaintiffs filed suit in federal district court on 31 January 1995 asserting claims under 42 U.S.C. § 1983 for violation of their federal First Amendment and Due Process rights, wrongful discharge in violation of public policy, and violation of the North Carolina Constitution. On 22 March 1996, the United States District Court denied defendants' motion for summary judgment concluding that genuine issues of material fact existed regarding Sheriff Vernon's motive for firing plaintiffs and rejecting defendants' Eleventh Amendment immunity defense. In *Harter v. Vernon*, 953 F. Supp. 685 (M.D.N.C. 1996), defendants made an interlocutory appeal of the Eleventh Amendment decision; however, the United States Fourth Circuit Court of Appeals affirmed. Nevertheless, on remand the United States District Court concluded that the intervening Fourth Circuit decision in *Jenkins v. Medford*, 119 F.3d 1156 (4th Cir. 1996), *cert. denied*, 522 U.S. 1090, 139 L.Ed.2d 869 (1998) required dismissal of plaintiffs' 42 U.S.C. § 1983 claims. *See Harter v. Vernon*, 980 F. Supp.

162, 165 (M.D.N.C. 1997). The federal court declined to retain the supplemental jurisdiction it had obtained over plaintiffs' state constitutional and wrongful discharge claims. Thus on 5 November 1997, the court dismissed plaintiffs' state claims without prejudice. Plaintiffs initially appealed to the Fourth Circuit Court the federal court's involuntary dismissal of their state claims. However, on 23 February 1998, the parties stipulated to a dismissal of that appeal and the Fourth Circuit dismissed pursuant to the parties' stipulation on 24 February 1998. Consequently on 20 July 1998, plaintiffs filed this action in state court alleging that they had been wrongfully discharged by defendants and that defendants had violated their right to freedom of speech and to participate freely in the political process under the Constitution of North Carolina.

In their answer, defendants alleged eight affirmative defenses, including the statue of limitations. On 11 March 1999, defendants filed a motion for summary judgment in which they did *not* specifically state the statute of limitations as grounds. However, on 6 April 1999, the trial court allowed defendant's motion "for the reasons stated in defendants' brief." Plaintiffs now appeal to this Court the trial court's grant of summary judgment to the defendants for several reasons. However, because we agree with defendants that plaintiffs' state action was untimely filed, we do not reach plaintiffs' arguments.

Recently this Court visited this very issue that is now before us: whether, after plaintiffs have filed their action in federal court and had their state claims dismissed without prejudice, plaintiffs can then file their actions in state court after the statute of limitations has run on the original claim. In the alternative, the question becomes does the federal action toll the statute of limitations or do plaintiffs automatically gain the advantage of N.C.R. Civ. P. 41(a) which allows plaintiffs one year from their voluntary dismissal in which to file.

We begin by noting that although plaintiffs argue they took a voluntary dismissal in federal court (thus N.C.R. Civ. P. 41(a) should apply giving plaintiffs one year to refile in state court), plaintiffs unambiguously admit that the federal district court "dismissed the[] [state claims] without prejudice" first. Such a dismissal, if under North Carolina law, would be an *involuntary dismissal* pursuant to N.C.R. Civ. P. 41(b) instead of 41(a), this Court having held that:

> "[I]f the [federal] court specifies that the dismissal of an action . . . is without prejudice, it may also specify in its order that a new action based on the same claim may be commenced within one year or less after such dismissal." [Thus,] [i]f plaintiff was to take advantage of the savings provision, *it was his responsibility to convince the federal courts to include* in the order or opinion a statement specifying *that plaintiff had an additional year to refile*. . . .

Clark v. Velsicol Chemical Corp., 110 N.C. App. 803, 809, 431 S.E.2d 227, 230 (1993) (emphasis added) (quoting N.C.R. Civ. P. 41(b)). Thus, under the present circumstances and pursuant to well established case law, plaintiffs would not be entitled to the additional year to refile provided in N.C. Gen. Stat. § 41(a) since the order did not so specify. Nevertheless, we choose to address plaintiffs' argument from the standpoint that they, in fact, did take a voluntary dismissal of their state claims in federal court.

The plaintiff in *Huang v. Ziko*, 132 N.C. App. 358, 511 S.E.2d 305 (1999), like the present plaintiff, initially filed his complaint in federal court and then attempted to file in state court after the federal court dismissed his action without prejudice. In his attempt to convince this Court that

the trial court had erred in dismissing his action, that plaintiff argued:

> [O]nce the federal action was no longer pending, the time for filing his complaint in state court should have been extended for the portion of the three-year limitations period that had not been used when he filed the federal action. Since less than a year and a half had passed when plaintiff filed his federal action, he would have had more than a year and a half after 7 December 1995 to file his complaint in state court.

Id. at 361, 511 S.E.2d at 307-08. However, this Court found the plaintiff's contention unpersuasive, opining:

> The rule which plaintiff would have this Court adopt is contrary to the policy in favor of prompt prosecution of legal claims. Furthermore, such a rule is contrary to the general rule that "[i]n the absence of statute, a party cannot deduct from the period of the statute of limitations applicable to his case the time consumed by the pendency of an action in which he sought to have the matter adjudicated, but which was dismissed without prejudice as to him[.]" 51 Am. Jur. 2d *Limitation of Actions* § 311 (1970). In this case, no statute or rule provides for the exclusion of the time during which the federal action was pending from the limitations period.
>
> We believe the question presented by this appeal is controlled by 28 U.S.C.A. § 1367 (1993). That federal statute provides that *when a federal district court has* original

jurisdiction over a civil action it may also exercise "pendent" or "*supplemental jurisdiction* over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy[.]" 28 U.S.C.A. § 1367(a). A federal district court may decline to exercise *supplemental jurisdiction* over a claim if it "has dismissed all claims over which it has original jurisdiction[.]" 28 U.S.C.A. § 1367(c)(3). The statute further provides that the *period of limitations for any supplemental claim* "shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period." 28 U.S.C.A. § 1367(d). *Since the claims now asserted by plaintiff were supplemental claims* dismissed by the United States District Court, he was entitled to thirty additional days to file his complaint in state court after the United States Court of Appeals reached its decision, unless some state statute provided for a longer period of time.

. . .

Because North Carolina has no applicable "grace period" longer than the thirty-day period set out in 28 U.S.C.A. § 1367, the statute of limitations was tolled while the federal action was pending and for thirty days thereafter. Plaintiff could have filed his complaint in state court at any time during the pendency of the federal action and up to thirty days after the United States Court of Appeals reached its decision . . . .

Id. at 361-62, 511 S.E.2d 308 (emphasis added) (citations omitted).

In the case at bar, there is no dispute that the statute of limitations began to run when plaintiffs were terminated on 15 July 1994 and ordinarily would expire on 15 July 1997. Like the plaintiff in *Huang*, *supra*, the plaintiffs at bar first filed in federal court on 31 January 1995 (6 months after the limitations period had begun to run), and the federal district court dismissed without prejudice plaintiffs' state claims on 5 November 1997. Plaintiffs appealed to the United States Fourth Circuit Court which later dismissed plaintiffs' appeal on 24 February 1998 pursuant to the parties' stipulated voluntary dismissal. Subsequently on 20 July 1998, plaintiffs filed their state claims action in state court. We find the facts in *Huang* sufficiently analogous and hold that plaintiffs had thirty days from 24 February 1998 to refile their state claims in state court, not one year.

> Under [28 U.S.C. § 1367(d)], the state period of limitations for a plaintiff's pendent state claims is tolled for a period of thirty days after the federal district court has dismissed the plaintiff's claims. . . . If, however, a plaintiff appeals the federal district court's dismissal of his claims, the plaintiff's pendent state claims are tolled for a period of thirty days following the date of the decision of the federal court of appeals.

Estate of Fennell v. Stephenson, __ N.C. App. __, __, 528 S.E.2d 911, 914 (2000) (slip op. 6).

However, plaintiffs argue that because *Huang*, *supra*, was decided seven months after the instant action was filed in state court, *Huang* cannot be applied retroactively. We recognize that plaintiffs' argument is essentially that *Huang* created an *ex post facto* effect with regard to whether the

statute of limitations is tolled by the federal action and how much time a plaintiff, under the present circumstances, has to refile her complaint in state court after the federal court has dismissed it. Plaintiff's argument is meritless.

Under U.S. Const. art. I, § 10, cl. 1, and N.C. Const. art. I, § 16, the law is well established that there are two critical elements which *must* be present for a law to be considered "*ex post facto*": (1) the case law or statute must apply to events occurring before its enactment, and (2) the case law or statute as applied must disadvantage the offender affected by it. *See State v. Jones*, 133 N.C. App. 448, 516 S.E.2d 405 (1999), and *In Re Hayes*, 111 N.C. App. 384, 432 S.E.2d 862 (1993). Thus, in order for plaintiffs' objection to be sustained, this Court must find that *Huang* was *both* decided after plaintiffs' firing *and* that applying *Huang* to plaintiffs' case will disadvantage them.

First, we agree with plaintiffs that *Huang* was decided after plaintiffs filed their action. However, we find it unnecessary to rely solely on *Huang* since earlier cases bring us to the same conclusion. The key to whether a plaintiff in the present situation gains the additional year provided under N.C.R. Civ. P. 41(a) is governed by *how* the federal court gained jurisdiction over the state issues.

> Ordinarily, a voluntary dismissal in federal court under *Federal Rule 41* "leaves the situation as if the action had never been filed." Wright & Miller, *Federal Practice and Procedure*: Civil § 2367 (1971). "*The statute of limitations is not tolled* by bringing an action that is later voluntarily dismissed." *Id.* Federal courts ordinarily need not consider the applicability of a savings provision, as the federal rule contains no such provision. *This applies to cases in federal court in which jurisdiction is not based on diversity of*

> *citizenship* and in which there is no occasion for the federal court to apply state substantive law.
>
> For example, in *Humphreys v. United States*, 272 F.2d 411 (9th Cir. 1959), a plaintiff sued the United States government under the Federal Tort Claims Act. Plaintiff's first suit in federal court was brought within the statute of limitations, but plaintiff voluntarily dismissed in order to sue in another federal court more convenient to the parties and witnesses. Plaintiff refiled in the other federal court outside the statute. The court upheld the denial of plaintiff's motion to set aside the order of dismissal and reinstate her first suit. It noted that the statute had expired when the motion as made because plaintiff's dismissal under the federal rules did not toll the statute and left "the situation the same as if the suit had never been brought in the first place." *Id.* at 412. Similar treatment of federal voluntary dismissals in *nondiversity cases* is seen in patent claims – *see A.B. Dick Co. v. Marr*, 197 F.2d 498 (2d Cir. 1952), *cert. denied*, 344 U.S. 878, 97 L.Ed. 680, *reh'g denied*, 344 U.S. 905, 97 L.Ed. 699 (1952) – ***and cases involving § 1983 claims*** *[with state claims attached], see Cabrera v. Municipality of Bayamon*, 622 F.2d 4 (1st Cir. 1980). *Thus, a voluntary dismissal under the* Federal Rules *in a nondiversity case in federal court does not toll the statute of limitations or invoke a savings provision.*

Bockweg v. Anderson, 328 N.C. 436, 438-39, 402 S.E.2d 627, 628-29 (1991) (emphasis added). Furthermore,

In *Haislip v. Riggs*, 534 F. Supp. 95 (W.D.N.C. 1981), plaintiff *filed in federal court a medical malpractice claim* [a state claim] *which was voluntarily dismissed, by stipulation of the parties, without prejudice*. Plaintiff sought to file the same action in a North Carolina state court within a year of the dismissal, but outside the statute of limitations, and suffered summary judgment on statute of limitations grounds because *High v. Broadnax* precluded application of the savings provision where the original suit was brought in a federal court . . . . Plaintiff then sought to refile his suit in federal court, whereupon defendant again moved to dismiss. The court in *Haislip* stated:

"This Court is of the opinion North Carolina Rule 41(a) is a tolling provision legislatively adopted and falls within the first category of the analysis [requiring application of state substantive law]. . . . The tolling of a state statute of limitations *in a diversity case* is strictly a substantive matter of state law which *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188 (1938) and *Guaranty Trust Co. v. York*, 326 U.S. 99, 65 S. Ct. 1464, 89 L.Ed. 2079 (1945) command that this Court follow absent substantial countervailing federal interests. *Id.* . . ."

[*Haislip*, 435 F. Supp.] at 98 (emphasis added) (citation omitted) . . . .

. . .

The effect of a voluntary dismissal in federal court, pursuant to the Federal Rules,

> *thus depends on whether the federal court's jurisdiction is based on the existence of a federal question or on diversity of citizenship.* . . . [T]he effect of a voluntary dismissal taken under the Federal Rules by a plaintiff in a federal court sitting in diversity applying North Carolina law is to allow the plaintiff up to one year to refile in federal court.

Id. at 440-41, 402 S.E.2d at 630 (emphasis added). Therefore, it is apparent that where the federal court gains jurisdiction over state issues strictly because the action is a *diversity action* (which is *not* the case here), the federal court must apply state substantive law *in all respects* of the case, including in its dismissal of the claims with or without prejudice. However where, as in the case at bar, the federal court gains jurisdiction over state claims *supplementally*, pursuant to 28 U.S.C.A. § 1367(a), because the action was first brought based on federal or constitutional law, the court is not bound to state substantive law only. Thus because, in the case before us, the federal court gained *supplemental* jurisdiction over plaintiffs' state law claims *not* due to diversity, 28 U.S.C.A. § 1367(d) applies and the limitations period for plaintiffs' *supplemental claims* was tolled for 30 days after the action was dismissed because "a voluntary dismissal under the Federal Rules in a nondiversity case in federal court does not toll the statute of limitations or invoke a savings provision." *Bockweg*, 328 N.C. at 439, 402 S.E.2d at 629. "The United States Code provides that when a state claim is brought in federal district court pursuant to 28 U.S.C. § 1367(a), the state period of limitations for the claim 'shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.'" *Fennell*, __ N.C. App. at __, 528 S.E.2d at 914 (slip op. 5) (quoting 28 U.S.C. § 1367(d) (1994)). In the case at bar, with plaintiffs' dismissal not falling under N.C.R. Civ. P. 41(a), there is no state law available to them that tolls the limitations period.

Plaintiffs further contend that "[d]efendants' statute of limitations defense is not properly before the court" because defendants did not "specify in its motion an intent to argue the statue of limitations . . . ." Again, we are unpersuaded. Although plaintiffs cite *Miller v. Talton*, 112 N.C. App. 484, 435 S.E.2d 793 (1993) in support of their position, we find it inapposite to their position and, in fact, find it dispositive in defendants' favor.

In *Miller*, the plaintiffs argued that because the defendants failed to formally amend their answer to affirmatively plead the statute of limitations, defendants' failure constituted a waiver of that defense. *Id.* at 487, 435 S.E.2d at 796. Finding that plaintiffs had either expressly or impliedly consented to defendants' raising the defense, this Court stated

> The affirmative defense relied upon *should be* referred to in the motion for summary judgment; *however, in the absence of an expressed reference, if the affirmative defense was clearly before the trial court, the failure to expressly mention the defense in the motion will not bar the trial court from granting the motion on that ground.* This is especially true where the party opposing the motion has not been surprised and has had full opportunity to argue and present evidence. "Thus, although it is better practice to require a formal amendment to the pleadings, unpleaded defenses, when raised by the evidence, should be considered in resolving a motion for summary judgment." *Ridings v. Ridings*, 55 N.C. App. 630, 632, 286 S.E.2d 614, 615-16, *disc. review denied*, 305 N.C. 586, 292 S.E.2d 571 (1982).

Id. at 487, 435 S.E.2d at 796-97 (citations omitted).

In the case at bar, we find it disingenuous for plaintiffs to argue that they did not have proper notice of defendants' intent to plead the statute of limitations as a defense. From the very beginning, defendants pled the affirmative defense in their answer. Thus no other notice was necessary. Additionally, plaintiffs' argument that because defendants failed to allege the defense in their motion for summary judgment they waived the defense is clearly incorrect under *Miller*, *supra*.

Finally, plaintiffs argue that because the trial court granted defendants' summary judgment motion "for the reasons stated in defendants' brief," defendants cannot now argue the statute of limitations defense because it could not have been the basis upon which the trial court granted summary judgment since it was not mentioned in defendants' brief to that court. Again, we are unpersuaded by plaintiffs' argument.

It has long been the law in North Carolina that in granting or denying a motion for summary judgment under N.C. Gen Stat. § 1A-1, Rule 56, the trial court may consider "the pleadings, depositions, interrogatories, and admissions on file, together with any affidavits . . ." which are before the court. *Johnson v. Insurance Co.*, 300 N.C. 247, 252, 266 S.E.2d 610, 615 (1980). Therefore, it was proper in this case for the trial court to consider defendants' answer (which included their affirmative defense of the statute of limitations) in granting their motion for summary judgment. Furthermore, our Supreme Court has long established that:

> If the granting of summary judgment can be sustained on *any* grounds, it should be affirmed on appeal. *If the correct result has been reached, the judgment will not be disturbed even though the trial court may* ***not***

> *have assigned the correct reason for the judgment* entered. . . .

Shore v. Brown, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989) (emphasis added).

Therefore, the judgment of the trial court is

Affirmed.

Judges GREENE and HORTON concur.

APPENDIX B -- ORDER OF THE SUPREME COURT OF NORTH CAROLINA FILED DECEMBER 20, 2000

SUPREME COURT OF NORTH CAROLINA

NO. 433P00

KENNETH WAYNE HARTER and
JOHN ROBERT PAYNE

v.

C.D. VERNON, individually and in his official capacity as Sheriff of Rockingham County; and U.S. FIDELITY AND GUARANTY COMPANY

From NC Court of Appeals
(COA99-992)
From Rockingham
(98CVS1274)

ORDER

Upon consideration of the notice of appeal from the North Carolina Court of Appeals, filed by the Plaintiffs in this matter pursuant to G.S. 7A-30, and the motion to dismiss the appeal for lack of substantial constitutional question filed by the Defendant, the following order was entered and is hereby certified to the North Carolina Court of Appeals: the motion to dismiss the appeal is

"Allowed by order of the Court in conference, this the 20th day of December, 2000.

s/ Orr, J.
For the Court"

Upon consideration of the petition filed by Plaintiffs in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

> **"Denied by order of the Court in conference, this the 20th day of December, 2000.**
>
> **s/ Orr, J.**
> **For the Court"**

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 28th day of December 2000.

Christie Speir Cameron
Clerk, Supreme Court of
North Carolina

s/ Carol B. Templeton
Carol B. Templeton
Assistant Clerk

Copy to:
North Carolina Court of Appeals
Ms. Martha A. Geer, Attorney at Law, For Harter and Payne
Mr. James R. Morgan, Jr., Attorney at Law,
for Vernon & US Fidelity
Mr. Ralph A. White, Appellate Court Reporter
West Publishing Company
Lexis-Nexis

Supreme Court, U.S.
FILED
APR 12 2001
OFFICE OF THE CLERK

No. 00-1478

IN THE

Supreme Court of the United States

KENNETH WAYNE HARTER and JOHN ROBERT PAYNE,

Petitioners,

v.

C.D. VERNON, individually and in his official capacity as Sheriff of Rockingham County, and U.S. FIDELITY AND GUARANTY COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NORTH CAROLINA SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JAMES R. MORGAN, JR.
Counsel of Record
WOMBLE CARLYLE SANDRIDGE & RICE, PLLC
Attorneys for Respondents
200 West Second Street
Post Office Drawer 84
Winston-Salem, NC 27102
(336) 721-3600

166395

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

REASONS FOR DENYING THE WRIT

Contrary to petitioners' assertions, the decision below does not conflict with any holding of this Court or any federal circuit court. The absence of conflict is best demonstrated by the fact that the petitioners have failed to cite a single case supporting their interpretation of 28 U.S.C. § 1367(d). In an effort to convince this Court to review an immediate level state appellate court decision, petitioners argue that the decision below conflicts with *Crown, Clark & Seal Co. v. Parker*, 462 U.S. 345, 103 S. Ct. 2392, 76 L. Ed. 2d 628 (1983). However, this Court's decision in *Crown, Clark* does not mention, cite, or even remotely rely on 28 U.S.C. § 1367(d). As demonstrated by the discussion below, the North Carolina Court of Appeals opinion in *Harter v. Vernon*, 139 N.C. App. 85, 532 S.E.2d 836, *disc. rev. denied*, 453 N.C. 263, 532 S.E.2d 836 (2000) does not conflict with any decision of this Court, and it is actually in complete accord with circuit court decisions interpreting 28 U.S.C. § 1367(d).

I. THE DECISION BELOW DOES NOT CONFLICT WITH ANY PRIOR DECISION OF THIS COURT

Crown, Clark involved 42 U.S.C. § 2000e-5(f) and the effect which a denial of class certification would have on a putative class member's ability to file an individual action. In *Crown, Clark*, the respondent, a discharged black employee, filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging racial discrimination by his employer. *Crown, Clark*, 462 U.S. at 347, 103 S. Ct at 2394. Prior to the filing of the respondent's charge with the EEOC, a class action was instituted against the employer. Although the respondent had no knowledge of the class action, it was undisputed that the respondent was a member of the asserted class. *Id.* On November 9, 1978, the EEOC issued a Determination Letter finding no reasonable cause to believe the respondent's charge, and the respondent was issued a Notice of Right to Sue. *Id.* The District Court denied class certification

of the pending class action on September 4, 1980. *Id.* Within 90 days of the denial of class certification, the respondent filed a Title VII action against his employer alleging that his discharge was racially motivated. 462 U.S. at 348, 103 S. Ct. at 2394-2395.

Respondent's employer filed for summary judgment on the grounds that respondent's action was barred by 42 U.S.C. § 2000-e(5)(f)(1), which requires the initiation of a Title VII action within 90 days of a Notice of Right to Sue. The Fourth Circuit Court of Appeals reversed, holding that the respondent's action was timely because it was filed within 90 days of the denial of class certification. *Id.* This Court affirmed the Fourth Circuit's decision finding that "unless the statute of limitations was tolled by the filing of a class action, class members would not be able to rely on the existence of the suit to protect their rights." 462 U.S. at 350, 103 S. Ct. at 2396. The Court stated that "[a] putative class member who fears that class certification may be denied would have every incentive to file a separate action prior to the expiration of his own period of limitations." 462 U.S. at 351, 103 S. Ct. at 2396. This Court explained that, in the absence of tolling, the purpose of Federal Rule of Civil Procedure 23 would be frustrated, and a "needless multiplicity of actions" would result. *Id.* Thus, the Court held that the commencement of a class action suspended the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action. 462 U.S. at 353-354, 103 S. Ct. at 2397.

As the preceding discussion of *Crown, Clark* demonstrates, petitioner's reliance on this case is misplaced. The decision below involved 28 U.S.C. § 1367(d) and its interplay with North Carolina state law. *Crown, Clark* neither mentions nor interprets 28 U.S.C. § 1367(d). *Crown, Clark* involved issues related to class certification and Title VII actions which played no role in the decision below. Consequently, *Crown, Clark* cannot be in

direct conflict with the decision below because *Crown, Clark* involved a different statute, different issues, and different concerns.

Crown, Clark is also procedurally distinguishable from the decision below. Here, it is important to note that the petitioners created the situation of which they now complain by voluntarily stipulating to a dismissal of their appeal to the United States Court of Appeals for the Fourth Circuit. Thus, unlike the respondent in *Crown, Clark*, the petitioners were completely in control of their situation. Petitioners also voluntarily decided to wait almost four months to file a state court action involving substantially similar claims, substantially similar issues, and the same parties as their federal action. At the time petitioners made these voluntary decisions, they were on notice that they only had 30 days to refile in state court.

Section 1367(d) took effect in 1990, and the practice commentary to 28 U.S.C.A. § 1367(d) specifically instructs practitioners of the necessity of refiling an action within 30 days, unless a state statute provides for a more generous time period. *See* David D. Siegel, *Practice Commentary*, 28 U.S.C.A. § 1367 (1993), pp. 829, 836. *Bockweg v. Anderson*, 328 N.C. 436, 439, 402 S.E.2d 627, 629 (1991) had established that North Carolina did not provide a more generous period of time. Furthermore, less than two months after the petitioners filed their federal action in the Middle District of North Carolina, the Court of Appeals for the District of Columbia stated that Section 1367(d) only tolled the state statute of limitations for 30 days following a dismissal. *See Edmondson & Gallagher v. AlBan Towers Tenants Ass'n.*, 48 F.3d 1260, 1267 (D.C. Cir. 1995) (stating that "Section 1367(d) tolls the state statute of limitations on any state claim over which a federal court has exercised supplemental jurisdiction until 30 days after its dismissal"). Thus, unlike the respondent in *Crown, Clark*, the petitioners' situation was created by their own actions, and they should have been on notice of the consequences of their actions.

II. THE DECISION BELOW IS COMPLETELY IN ACCORD WITH THE CIRCUIT COURT DECISIONS AND STATE COURT DECISIONS INTERPRETING 28 U.S. § 1376(d)

As demonstrated by the previous section, the decision below in no way conflicts with any decision of this Court. The decision below also does not conflict with any decision of the circuit courts. In actuality, the decision below is clearly in accord with the decisions of numerous circuit courts. *See Edmondson*, 48 F.3d at 1267 (stating that "Section 1367(d) tolls the state statute of limitations on any state claim over which a federal court has exercised supplemental jurisdiction until 30 days after its dismissal"); *Seabrook v. Jacobson*, 153 F.3d 70, 72 (2d Cir. 1998) (stating: "Section 1367(d) ensures that the plaintiff whose supplemental state claim is dismissed has at least thirty days after dismissal to refile in state court. Some states, including New York, allow a longer period."); *Beck v. Prupis*, 162 F.3d 1090, 1099-1100 (11th Cir. 1998) (stating that "a dismissal under section 1367 automatically tolls the statute of limitations on the dismissed claims for 30 days . . ."); *Long v. Bando Mfg. of America*, 201 F.3d 754 (6th Cir. 1999) ("Section 1367(d) tolls the state statute of limitations on any state claim over which a federal court has exercised supplemental jurisdiction until 30 days after its dismissal"); *Hedges v. Musco*, 204 F.3d 109, 123 (3rd Cir. 2000) (citing *Beck* and *Seabrook* and stating "a dismissal under section 1367 tolls the statute of limitations on the dismissed claims for 30 days"). As these cases demonstrate, courts across the country agree with the decision below, and these cases illustrate that there is no basis for granting a writ of certiorari in this case.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

JAMES R. MORGAN, JR.
Counsel of Record
WOMBLE CARLYLE SANDRIDGE
& RICE, PLLC
Attorneys for Respondents
200 West Second Street
Post Office Drawer 84
Winston-Salem, NC 27102
(336) 721-3600